STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: D. Holbrook, H. Hood, R. Griffin

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant	Supreme Court No. 119429
-vs-	Court of Appeals No. 230811
PAUL LEWIS PHILLIPS, JR., Defendant-Appellee	Saginaw Circuit Court No. 00-018277-FC

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The People appeal from the published per curiam opinion of the Court of Appeals in this case, released on May 25, 2001. (40a-41a) The Court of Appeals decision in this interlocutory matter reversed a Saginaw County Circuit Court Order requiring that the Defendant provide certain discovery information to the Prosecutor. The People sought leave to appeal in this Court and on July 10, 2002, the Court granted the People's application for leave to appeal.(36a-39a, 48a)

MCR 7.301(A) provides the basis for jurisdiction over this appeal by leave granted.

STATEMENT OF QUESTION PRESENTED

I. Rule 6.201 and MCL 767.94a establish discovery procedures designed to enhance a fair ascertainment of the truth and an orderly presentation of facts in a criminal case. Both the court rule and the statute, as well as MRE 705, provide the trial judge with the authority to order reports from a defendant's expert witnesses where, as here, the defense has failed to comply with a discovery request and order regarding expert witnesses. Did the Court of Appeals err by improperly concluding that the trial court abused its discretion in ordering Defendant to provide basic reports on his expert witnesses at the prosecutor's request after Defendant's repeated discovery violations?

The Court of Appeals said "NO".

The Trial Court did not answer.

Defendant-Appellee says "NO".

Plaintiff-Appellant says "YES".

STATEMENT OF FACTS

In December of 1999, Defendant was charged with Second-Degree Murder, in the alternative OUIL causing death, in the alternative Manslaughter with a Motor Vehicle. (1a) Following a preliminary examination, Defendant was bound over to the circuit court for trial on those charges. (1a)

On February 28, 2000, the prosecutor filed the People's "Request for Discovery" with defense counsel, pursuant to the applicable court rules. (2a, 7a)

After the Prosecutor had provided discovery to Defendant and Defendant failed to provide complete discovery as requested by the Prosecutor - addresses of witnesses, statements of witnesses, reports of experts, the Prosecutor filed the People's first motion to strike defense witnesses. (2a, 9a, 23a-24a)

On May 15, 2000, in response to the prosecutor's motion, the trial judge ordered Defendant to provide discovery on defense witnesses and reports by defense experts. (2a, 11a)

In August of 2000, the prosecutor filed a second motion to strike based upon Defendant's continued failure to provide complete discovery. The prosecutor specifically referred to Defendant's failure to provide discovery as requested and as required under the court rule - Defendant initially provided only the names of witnesses and then failed to provide addresses for all witnesses. The prosecutor also noted that it was in the interest of justice to require reports and information from

Defendant's expert witnesses because the People would be hindered in preparing for trial and because trial by ambush is disfavored. (2a-3a, 14a-16a)

On September 5, 2000, at the hearing on the People's second motion to strike, the prosecutor argued that defense counsel had not complied with the discovery rule and prior order. The prosecutor also pointed out that defense counsel seemed to be avoiding discovery by purposely not asking for reports from his experts. (24a-25a) The prosecutor explained that not only did he have no statements or reports from witnesses listed by Defendant, he had not received any measurements or other information from defense experts. The prosecutor asserted that the failure of the defense to provide information from his experts would unfairly restrict the People and cause delay during trial because any information the Defendant's expert witnesses would provide would not be obtained until they testified during trial. (24a) The prosecutor cited MCL 767.94a, several Michigan cases, and MCR 6.201 in support of his position. (23a-24a)

Defense counsel acknowledged at the hearing that he had not asked his experts for reports. Defense counsel also admitted that his accident reconstruction expert had taken photographs and taken measurements. Defense counsel did not provide copies of the photographs or measurements to the People and he did not provide any report on them. (27a-29a)

At the conclusion of the September 5th hearing, the trial judge noted that he had reviewed the rules, the statute, and the cases. (28a) He concluded that:

> I'm going to deny the request to strike the witnesses. I am going to ask that you provide them [the People] with a basic report on these experts and on the findings that the experts have. (29a)

The prosecutor then requested curriculum vitae for each of the experts and defense counsel responded "sure". (29a)

On September 11, 2000, the trial judge signed an Order stating:

> IT IS HEREBY ORDERED that the Defendant's attorney obtain reports from the defense experts and provide them within thirty (30) days to the People.
>
> IT IS FURTHER ORDERED that Defendant's attorney will provide curriculum vitae of all the experts it plans to call. (32a)

On October 5, 2000, Defendant filed a motion for reconsideration in which he asserted that an order had not been filed with the court in relation to the September 5th hearing - apparently because the defense had not received the Order. (3a, 33a-35a)

The focus of the September hearing and the Motion for Reconsideration was the expert witnesses listed by the defense as witnesses for trial:

(1) Dr. Martin Shinedling, Ph.D.;

(2) Dr. David Schneider, a toxicologist;

(3) Dick Toner, an accident reconstructionist;

(4) Robert Pashella, of the University of Michigan.

(12a-13a, 34a-35a)

On October 20, 2000, the trial judge issued an Order denying defense counsel's motion for reconsideration of his September decision and explained:

> The Court denied the Prosecutor's Motion to Strike. However, the Court ordered the Defendant to provide the Prosecutor with a basic report on each of his experts, a basic report of each expert's findings, and a curriculum vitae on each expert within thirty days. (33a-35a)

The trial judge explained:

> In the present case, the Court agrees with the Defendant That the three cases cited by the Prosecutor are not directly on point with the situation. However, the Court believes that MCLA 767.94a; MSA 28.1023(194a) and MCR 6.201 provide the Court with the discretion to order the creation of such reports. (35a)

In October of 2000, the defense filed a vitae for experts Schneider and Schindeling, and a statement from Schindeling. However, no vitae, address for witness Pashella, or reports from the other defense experts were provided to the People. (3a, 13a)

In November of 2000, Defendant filed an interlocutory application for leave to appeal in the Court of Appeals. The Court granted the application and heard arguments in the case in May of 2001. (36a-38a)

On May 25, 2001, the Court of Appeals issued a published opinion reversing the decision of the trial court. (38a-41a) The Court of Appeals decision stated, in pertinent part:

> [T]he court rule is specific: 'On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.' MCR 6.201(I) The trial court did not show why good cause existed and apparently did not base its decision on good cause modification but rather on the trial court's discretion. The trial court abused its discretion in compelling defendant to create expert reports where none existed because the prosecutor was not entitled to disclosure. (40a-41a)

In June of 2001, the People filed an interlocutory application for leave to appeal in this Court and in October this Court remanded the case for a "good cause determination under MCR 6.201(I)" and retained jurisdiction. (38a-39a,42a)

In February of 2002, the trial judge issued an Opinion and Order regarding the good cause issue and discovery. (43a-47a) The trial judge found as follows:

> Defendant failed to fully comply with discovery requests and orders by failing to initially disclose the addresses of experts and failure to provide information from the experts. This Court in attempting to fashion an appropriate remedy for the discovery violation caused by the Defendants, took into account the defendant's due process rights to a fair trial, the prosecutor's interest in obtaining convictions on relevant and admissible evidence and the Court's interest in expeditiously administering justice and maintaining judicial integrity. The intent of this Court is to ensure a prompt and fair adjudication of the facts.(47a)

On July 10, 2002, this Court granted the People's application for leave to appeal and indicated that among the issues to be briefed are:

* Whether MCR 6.201 or MCL 767.94a allows a trial court to compel creation of a report from a proposed defense expert witness;

* Whether the court rules authorize a trial court to compel disclosure of a defense;

* Whether the Court Rule-MCR 6.201 or the Statute-MCL 767.94a controls discovery in a criminal case; and

* Whether MRE 705 gives the trial court discretion to order disclosure of a defense expert's opinion? (48a)

The People submit this brief in support of the discovery order and addressing each of the issues.

SUMMARY OF ARGUMENT

The court rule and statute providing for discovery in a criminal case - MCR 6.201 and MCL 767.94a - establish discovery procedures designed to enhance a fair ascertainment of the truth and an orderly presentation of facts.

MCR 6.201 as a rule of procedure established by this Court is the controlling authority in this matter. The rule clearly allows a trial judge to order a remedy for a violation of the discovery rule and related orders. A proper reading of the rule reveals that upon good cause shown to the trial judge, the judge may order a modification of the requirements and prohibitions of the rule. The rule also provides that if a party fails to comply with the rule the court has discretion to order a remedy.

Decisions by the Courts of this State have always recognized that the trial judge must have the authority to control pretrial and trial proceedings to provide for a fair and orderly presentation of evidence. Without such discretion, the rules have no effect and the authority of the court and the judicial process is undermined.

MRE 705 also supports the decision of the trial judge to order disclosure of a basic report from Defendant's expert witnesses. Rule 705 is designed to allow for a full disclosure of facts underlying an expert's opinion through cross-examination. Advance knowledge through pretrial discovery of the basis for an expert's opinion is essential for effective cross-examination.

In the present case, the Court of Appeals failed to consider the factors leading to the trial court's order requiring Defendant to produce basic reports from his experts. Moreover, the Court of Appeals decision implies that the only discovery a trial court can require is that allowed under the mandatory provisions of the court rule. This limited and restrictive view is not supported by the language of MCR 6.201, MCL 767.94a, or MRE 705 and it is not supported by the underlying policy of all discovery provisions - a complete and fair ascertainment of the truth.

The Court of Appeals misinterpreted the rule and failed to consider the special concerns and needs arising where expert testimony is in issue.

The trial judge in the present case acted within the Rule based upon a good cause finding of discovery violations and a need for discovery from the expert witnesses. The judge also acted well within the scope of his discretion to control trial proceedings and ensure fairness, as well as efficiency in those proceedings by requiring the defense to provide basic reports from the expert witnesses the defense had named as trial witnesses.

ARGUMENT

Rule 6.201 and MCL 767.94a establish discovery procedures designed to enhance a fair ascertainment of the truth and an orderly presentation of facts in a criminal case. Both the court rule and the statute, as well as MRE 705, provide the trial judge with the authority to order reports from a defendant's expert witnesses where, as here, the defense has failed to comply with a discovery request and order regarding expert witnesses.

I. INTRODUCTION

The issues in the present case arise from the prosecutor's request for discovery from the defense. Relying upon MCR 6.201 and MCL 767.94a, the prosecutor requested that the trial judge strike Defendant's expert witnesses from testifying at trial due to the defense failure to provide the names and addresses of the expert witnesses as provided for under MCR 6.201. The trial judge found that MCL 767.94a and MCR 6.201 provide the Court with the discretion to order the creation of basic reports from the experts named by the defense as witnesses.

Discovery in this state, as in most other jurisdictions, has evolved to allow a pretrial exchange of information in criminal cases in order to preclude trial by ambush and to ensure a fair trial. The statute and the court rule both provide for discovery by the defense to the prosecution. Moreover, the discretion of the

trial court to control trial and pretrial proceedings for a fair and efficient administration of justice is well-established.

II. STANDARDS OF REVIEW

De novo review applies to issues of law including the interpretation of statutes and court rules.[1]

The standard applicable to a trial court's decision regarding discovery is abuse of discretion.[2]

As the appellate courts of this state have repeatedly recognized, an abuse of discretion only occurs when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made.[3] Close questions on evidentiary matters involving a trial court's discretion, including discovery, should not be reversed simply because the reviewing court would have ruled differently.[4]

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[1] See CARDINAL MOONEY HIGH SCHOOL v MICHIGAN HIGH SCHOOL ATHLETIC ASS'N, 437 Mich 75, 76; 467 NW2d 21 (1991); PEOPLE v HOLTZMAN, 234 Mich App 166, 175; 593 NW2d 617 (1999).

[2] See 6.201(I). See also PEOPLE v STANAWAY, 446 Mich 643, 680; 521 NW2d 557 (1994) cert den 513 US 1121 (1995) (pre-court rule case re: discovery).

[3] PEOPLE v HENDRICKSON, 459 Mich 229, 235; 586 NW2d 906 (1999); PEOPLE v ULLAH, 216 Mich App 669, 673; 550 NW2d 568 (1996).

[4] See PEOPLE v FINK, 456 Mich 449, 458; 574 NW2d 28 (1998).

III. PERTINENT LAW AND BACKGROUND

Interpretation of Statutes and Court Rules

If the language of a statute or court rule is clear, the court should apply it as written.[5] Interpretation should be based upon the commonly understood meaning of the language used, with due consideration given to the purpose of the statute or rule.[6]

The nature and development of discovery in criminal cases

There is no constitutional right to discovery in a criminal case.[7] Discovery is generally recognized as a matter of procedure designed to aid in the judicial search for the truth - assuring fairness in the adversary system through a fair presentation of the issues.[8] Whether the rights are created by statute, court rule or caselaw the basic premise is the same - to assure a fair and accurate resolution of the question of guilt or innocence through

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[5] PEOPLE v VALECK, 223 Mich App 48, 50; 566 NW2d 267 (1997) lv den 455 Mich 868 (1998).

[6] HOLTZMAN, supra, 234 Mich App at 175.

[7] WEATHERFORD v BURSEY, 429 US 545, 559; 97 S Ct 837; 51 L Ed 2d 30 (1977).

[8] PEOPLE v BURWICK, 450 Mich 281, 296-298, 314; 537 NW2d 813 (1995); See also WARDIUS v OREGON, 412 US 470, 473-474; 93 S Ct 2208, 2211; 37 L Ed 2d 82 (1979)(pretrial discovery enhances the fairness of the adversary system); PEOPLE v VANDERVLIET, 444 Mich 52, 89; 508 NW2d 114 (1993)(discovery promotes reliable decision making).

adequate safeguards to assure thorough preparation and presentation of each side of the case.[9]

The United States Supreme Court in TAYLOR v ILLINOIS, in addressing a discovery issue and defendant's constitutional arguments related to discovery, explained:

> The adversary process could not function effectively without adherence to the rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponents case. The trial process would be a shambles if either party had an absolute right to control the time and content of his witnesses' testimony.
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> * * * * *
>
> The State's interest in the orderly conduct of a criminal trial is sufficient to justify the imposition and enforcement of firm, though not always inflexible, rules relating to the identification and presentation of evidence.[10]

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[9] See UNITED STATES v NOBLES, 422 US 225, 237-238; 95 S Ct 2160; 45 L Ed 2d 141 (1975); STATE v MAI, 294 Or 269; 656 P2d 315, 319 (1982); Note, Michigan strives to balance the adversarial process and seek the truth with its new reciprocal criminal discovery rule, 74 U Det Mercy L R 317, 326 (1997).

[10] TAYLOR v ILLINOIS, 484 US 400, 410-412; 108 S Ct 646, 653-654; 98 L Ed 2d 798 (1988). See also PEOPLE v ELSTON, 462 Mich 751, 773 n5; 614 NW2d 595 (2000)(Kelly, J. concurring in part and dissenting in part)("competing interests of the parties, the court and the public, include: (1) the prosecutor's interest in convicting criminals through the use of relevant and admissible evidence, (2) the defendant's due process right to a fair trial, (3) the court's interest in expeditiously administering justice, and (4) the public's interest in judicial integrity and the protection of society from criminals").

In WILLIAMS v FLORIDA, the United States Supreme Court found that a rule, designed to enhance the search for the truth in a criminal trial by insuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence, comports with due process.[11]

The modern "role of discovery in criminal trials" has also been recognized and explained by this Court, as follows:

> The purpose of broad discovery is to promote the fullest possible presentations of the facts, minimize opportunities for falsification of evidence, and eliminate vestiges of trial by combat. These developments are entirely consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice.[12]

Thus, to enhance the fairness of the adversary system and the truth-seeking function of trial, the courts of this state and in most jurisdictions have allowed discovery practices in criminal cases to evolve and expand - first, allowing discovery by the defense from the prosecution, and second, allowing discovery by

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[11] WILLIAMS v FLORIDA, 399 US 78, 81-82; 90 S Ct 1893, 1896; 26 L Ed 2d 446 (1970).

[12] PEOPLE v WIMBERLY, 384 Mich 62, 66; 179 NW2d 623 (1970). See also PEOPLE v STEVENS, 461 Mich 655, 668; 610 NW2d 881 (2000) (truth-finding function of our legal system is best served when as much evidence as possible relevant to the charge is submitted to the finder of fact).

the prosecution from the defense.[13] Following the same route, the American Bar Association standards for criminal discovery and trial provide for expansive rights of discovery to both the defense and the prosecution.[14]

In jurisdictions where discovery has not evolved into a reciprocal, two-way street, commentators lament the effect that limited procedures for discovery have on the truth-seeking process.[15] The reasons for refusing or limiting reciprocal discovery - particularly discovery for the prosecution have been based upon concerns related to a defendants' constitutional rights. However, in most jurisdictions the courts have not found reciprocal discovery provisions actually violate defendants' rights. For example, courts have found that a defendant is not

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[13] See PEOPLE v LEMCOOL (AFTER REMAND), 445 Mich 491, 496-500; 518 NW2d 437 (1994) 445 Mich 491, 498; 518 NW2d 437 (1994); Lee, Criminal discovery: What truth do we seek?, 4 U DC L R 7, 10-14, 25-26 (1998) (Appendix lists criminal discovery rules information for all the states); Note, Sidestepping Scott: Modifying criminal discovery in Alaska, 15 Alaska L R 33 (1998); Note, Michigan strive to balance, supra note 9, at 321-325.

[14] American Bar Association, Standards for Criminal Justice: Discovery and Trial by Jury, Discovery Standards 11.1.1-11.2.2 (3d ed 1994). See also Note, Michigan strives to balance, supra note 9, at 326.

[15] See Kane, Criminal discovery - the circuitous road to a two-way street, 7 U SF L R 203 (1973); Lee, supra note 13, at 18-25; Note, Sidestepping Scott, supra note 13, at 57-58.

being compelled to produce any evidence or incriminate himself by revealing witnesses or by revealing the defense prior to trial.[16]

Statutory provisions for criminal case discovery in Michigan

Chapter 767 of the Code of Criminal Procedure addresses proceedings before trial. In Section 94a, the Code provides for disclosure to the prosecuting attorney of material or information within the possession of control of a defendant or his attorney.[17] The material that must be disclosed by the defense upon request includes:

> (a) The name and last known address of each witness other than the defendant whom the defendant intends to call at trial provided the witness is not listed by the prosecuting attorney;
>
> (b) The nature of any defense the defendant intends to establish at trial by expert testimony;
>
> (c) Any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence, or that was prepared by a person, other than the defendant, whom the defendant intends to call as a witness, if the report or

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[16] See WILLIAMS v FLORIDA, supra; NOBLES, supra, 422 US at 234. See also COMMONWEALTH v PASZKO, 391 Mass 164; 461 NE2d 222, 236-237 (1984)(defendant not constitutionally entitled to a discovery system that operates only to his benefit, expert's report not work product where it did not include legal research, opinions, statements of defendant or theories of defense counsel); Kane, supra note 13, at 210-214; Note, Michigan strives to balance, supra note 9, at 351-354.

[17] MCL 767.94a.

> statement relates to the testimony to be offered by the witness;
>
> (d) Any book, paper, document, photograph, or tangible object that the defendant intends to offer in evidence or that relates to the testimony of a witness, other than the defendant, whom the defendant intends to call.[18]

Section 94a became effective on October 1, 1994.[19] The statute also provides that the defense shall comply with the disclosure provisions not later than 10 days before trial or at any other time as the court directs.[20] Section 3 of the statute allows for a motion by the defense before or during trial to admit previously undisclosed evidence.[21] This statute was introduced as a House Bill while the decision of this Court in PEOPLE v LEMCOOL (AFTER REMAND)[22] was pending.[23] The stated purpose of the bill was to serve and improve the administration of justice by providing statutory authority for discovery to the prosecutor in the same

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[18] MCL 767.94a(1).

[19] Historical notes to MCL 767.94a.

[20] MCL 767.94a(2).

[21] MCL 767.94a(3).

[22] LEMCOOL, supra.

[23] HB 4227/Public Act 113 of 1994: Second Analysis (1-12-95).

manner already allowed for the defense.[24]

In the same chapter of the Code as Section 94a, notice provisions to the Defendant by the prosecution are set forth - the prosecutor is required to specify the charges, time and place in the information or indictment.[25] In another section of this chapter, the prosecutor's requirements for disclosure to the defense include the names of all known res gestae witnesses and the names of all witnesses the prosecutor intends to call at trial. In addition the prosecutor is required to provide the defense with assistance in locating witnesses.[26]

Other statutorily created procedures for discovery include defense requirements to tender notice of affirmative defenses:

- alibi[27]
- duress as a defense to prison escape[28]
- insanity[29].

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[24] HB 4227: First Analysis (3-16-94).

[25] MCL 767.43-45.

[26] MCL 767.40a.

[27] MCL 768.20.

[28] MCL 768.21b.

[29] MCL 768.20a. See also VANDERVLIET, supra, 444 Mich at 89, and MRE 404(b) (trial judge may require defendant to articulate his theory or theories of defense).

Under each of these statutes requiring notice by the defense, the prosecutor must also tender notice of rebuttal. These procedures have been found valid in this state and in other jurisdictions as well.[30]

Court rule providing for criminal case discovery in Michigan

A reciprocal discovery rule, MCR 6.201, setting forth the procedures for disclosure of information by both the prosecutor and the defense under the rules of criminal procedure was adopted by this Court in November of 1994 and made effective January 1, 1995. The provisions of Rule 6.201 include:

> (A) Mandatory Disclosure.
>
> In addition to disclosures required by provisions of law other than MCL 767.94a; MSA 28.1023(194a), a party upon request must provide all other parties:
>
> (1) the names and addresses of all lay and expert witnesses whom the party intends to call at trial;
>
> * * * * *
>
> (3) any report of any kind produced by or for an expert witness whom the party intends to call at trial;
>
> * * * * *
>
> (5) any document, photograph, or other paper that the party intends to introduce at trial.
>
> (B) Discovery of Information Known to the Prosecuting Attorney.
>
> Upon request, the prosecuting attorney must provide each defendant:

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[30] E.g. WILLIAMS v FLORIDA, supra.

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case;

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(C) Prohibited Discovery.

(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).

(2) If a defendant demonstrates a good-faith belief, grounded in articuable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in-camera inspection of the records.

* * * * *

(I) Modification.

On good cause shown, the court may order a modification of the requirements and prohibitions of this rule.

(J) Violation.

If a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy.

Promulgation of this rule followed this Court's decision in LEMCOOL(AFTER REMAND) and the enactment of MCL 767.94a.[31] In conjunction with issuing the rule, the Court issued Administrative Order 1994-10, stating that discovery in criminal cases is governed by the court rule, and not by MCL 767.94a.[32] The Order cited MCR 1.104 - a rule that provides:

> Rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court.

In addition, the general provisions applicable to the rules of criminal procedure provide that the rules supersede any statutory procedure pertaining to and inconsistent with a procedure provided by a rule in this chapter.[33] Moreover the stated purpose of the rules of criminal procedure is to promote a just determination in every criminal proceeding, to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.[34]

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[31] 1995 Staff Comment to MCR 6.201.

[32] AO 1994-10; 1995 Staff Comment to MCR 6.201.

[33] MCR 6.001(E).

[34] MCR 6.002.

The Order, 1994-10, also cited Const 1963, art 6 sec 5 - which provides in pertinent part:

> The supreme court shall by general rules establish, modify, amplify and simplify the practice and procedure in all courts of this state.

This Court has noted that the provisions of article 6 provide the Court with broad powers to make rules tending to increase the efficient administration of justice.[35]

Thus, MCR 6.201 was promulgated to modify, amplify, and simplify practice and procedure related to discovery in felony criminal cases. Moreover, as this Court has already determined the Rule 6.201 supercedes MCL 767.94a.

Procedure not Substantive Law

As noted above, the Michigan constitution provides the supreme court with the exclusive authority to determine rules of practice and procedure.[36] However, as this Court has long recognized, the function of court rules is to regulate the court and its business. A rule cannot enlarge or restrict

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[35] BUSCAINO v RHODES, 385 Mich 474, 478-479; 189 NW2d 202 (1971) partially overruled on other grounds MCDOUGAL v SCHANZ, 461 Mich 15, 32 (1999).

[36] Const 1963, art 6, sec 5; MCDOUGAL v SCHANZ, 461 Mich 15, 26-27; 597 NW2d 148 (1999).

jurisdiction, or abrogate or modify substantive law.[37] Thus, court rules pertaining to matters of practice and procedure generally prevail if a court rule conflicts with a statute.[38] If there is no conflict the court need not address whether a statute involves a legislative attempt to displace the court's rulemaking authority.[39]

In MCDOUGAL v SCHANTZ, this Court confronted the issue of whether the expert testimony statute applicable in medical malpractice case was in conflict with MRE 702 on expert testimony.[40] In finding a conflict, the Court held that the legislative enactment was directly intended to create different qualification standards than those found in MRE 702.[41] This Court also found that the statute involved more than the mere dispatch of judicial business; the statute was based upon wide-ranging

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[37] PEOPLE v GLASS(AFTER REMAND), 464 Mich 266, 281; 627 NW2d 261 (2001); MCDOUGAL, 461 Mich at 27; SHANNON v CROSS, 245 Mich 220, 223; 222 NW 168 (1928). See also Casenote, McDougal v. Schanz: Distinguishing the authorities of the Michigan Legislature and Michigan Supreme Court to establish rules of evidence, 2000 L R Mich St U DCL 857.

[38] See PEOPLE v CONAT, 238 Mich App 134, 162; 605 NW2d 49 (1999).

[39] MCDOUGAL, supra, 461 Mich at 24; Casenote, supra note 36 at 867.

[40] MCDOUGAL, supra, 461 Mich at 24-26.

[41] Id. at 35; Casenote, supra note 36, at 868.

and substantial policy considerations relating to medical malpractice actions against specialists and was therefore an enactment of substantive law.[42] The Court established that a statutory rule of evidence only violates the court's rule making authority when "no clear legislative policy other than judicial dispatch of litigation can be identified."[43]

Discovery rules including those applicable in criminal cases are generally accepted and described as rules of procedure.[44] The United States Supreme Court has observed that:

> The adversary process could not function effectively without adherence to the rules of procedure that govern the orderly presentation of facts and arguments to provide each party with a fair opportunity to assemble and admit evidence to contradict or explain the opponent's case.[45]

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[42] MCDOUGAL, supra, 461 Mich at 37; Casenote, supra note 35, at 870, 874.

[43] MCDOUGAL, supra, 461 Mich at 30.

[44] See ABA Standards, supra, Standard 11.1.1 ("procedures"); STATE v HUTCHINSON, 111 Wash 2d 872; 766 P2d 447, 450-451 (1989); STATE v ATWOOD, 420 NY Supp 2d 1002, 1005; 101 Misc 2d 291 (1979).

[45] TAYLOR v ILLINOIS, supra, 484 US at 410-411, quoted in BURWICK, supra, 450 Mich at 307 n22 (Levin dissenting).

The rule making authority of courts varies by jurisdiction with a majority of states provisions for criminal discovery included in the rules of procedure.[46]

As noted above, Rule 6.201 was implemented as a rule of procedure and although MCL 767.94a does not conflict with the rule, the statute has been superseded by the rule under the court's authority to provide for rules of practice.

Rule modification and sanctions for discovery violations

The rules of discovery relate to evidentiary issues over which trial courts have considerable discretion. Trial courts also have a responsibility to control trial proceedings and to ensure fairness to all parties.[47] Thus, even before the implementation of the discovery rule, our courts repeatedly recognized that a trial judge addressing discovery issues may exercise discretion over discovery questions and may fashion a

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[46] See Lee, supra note 13, Appendix.

[47] MCR 6.002; MCR 6.414; PEOPLE v INMAN, 315 Mich 456; 24 NW2d 176 (1946). See also NOBLES, supra 422 US at 230-2321 (trial court has inherent authority to control discovery matters); TAYLOR v ILLINOIS, supra (exclusion of a witness testimony is permissible when the explanation for failure to comply with a discovery rule reveals such failure was both willful and motivated by a desire to obtain an unfair tactical advantage).

remedy for noncompliance with a discovery order or agreement.[48]

In PEOPLE v VANDERVLIET, this Court specifically noted that:

> Michigan recognizes the broad power of the trial court to prevent ambush and surprise through the use of discovery, limited only by a defendant's right not to incriminate himself.[49]

Under the current discovery rule, 6.201, a court may modify the requirements of the rule on good cause shown and order an appropriate remedy for violations of the rule.[50] The rule does not define "good cause", but the Utah Court of Appeals addressing a good cause requirement in relation to discovery in a criminal case found good cause for pretrial disclosure of certain evidence upon a showing that the requested evidence was necessary to proper preparation for trial.[51] Other courts have

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[48] See NOBLES, supra, 422 US at 231; FINK, supra, 456 Mich at 458; LEMCOOL, supra, 445 Mich at 498-499; BURWICK, supra, 450 Mich at 298; VALECK, supra, 223 Mich App at 50-52. See also TAYLOR v ILLINOIS, supra, 484 US at 419 (Brennan, Marshall & Blackmun JJ. dissenting) (violations of discovery rules cannot go uncorrected or undeterred without undermining the truthseeking process).

[49] VANDERVLIET, supra, 444 Mich at 89 n53 (citations omitted).

[50] MCR 6.201 (I) & (J).

[51] STATE v MICKELSON, 848 P2d 677, 689 (Utah App 1992).

found good cause for pretrial disclosure of information based upon what is reasonable and just.[52]

Our Court of Appeals recognized in PEOPLE v VALECK, that a trial court may order discovery on two different grounds:

(1) pursuant to the court rules providing that certain discovery is mandatory; and

(2) pursuant to the trial court's discretion in criminal cases to grant additional discovery.[53]

Other courts and commentators have repeatedly recognized that discovery can only be a meaningful tool if it can be enforced by the trial court.[54]

The Minnesota Supreme Court has also explained that:

> The imposition of sanctions for violations of discovery rules and orders is a matter particularly suited to the judgment and discretion of the trial court.[55]

Even where a trial court has refused to allow the presentation of evidence based upon a discovery violation, such sanctions have generally been upheld and courts have found no impairment of the privilege against self-incrimination or denial of compulsory

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[52] See STATE v COMTOIS, 122 NH 1173, 453 A2d 1324, 1325-1326 (1982).

[53] VALECK, supra, 223 Mich App at 50.

[54] See MAI, supra, 656 P2d at 319 citing Kane, supra, 7 U SF R at 213; STATE v LINDSEY, 284 NW2d 368, 374 (Minn 1979).

[55] STATE v LINDSEY, supra, 284 NW2d at 373.

process - merely a reasonable condition to the exercise of that right.[56] However, suppression of evidence as a sanction is generally recognized as a proper sanction only when no lesser sanction would serve the interests of truth and fairness.[57] Thus, courts have been encouraged to consider lesser remedial sanctions. Courts have also recognized and discouraged the practice of deliberately failing to learn or aquire information for which pretrial disclosure is required, reasoning that such gamesmanship is inconsistent with the quest for the truth.[58]

The Rules of Evidence and Expert Witnesses

Expert witnesses are recognized as persons with specialized knowledge who may have an opinion based upon facts or data analyzed before trial.[59] MRE 705 specifically provides that the court may require prior disclosure of facts or data underlying the

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[56] See TAYLOR v ILLINOIS, supra, 484 US at 415-417; STATE v MAI, supra, 656 P2d at 319 (cases from various jurisdictions cited); 9 ALR 4th 837(1981)(sanctions against defense in criminal case for failure to comply with discovery requirements).

[57] See PEOPLE v CLARK, 164 Mich App 224, 229-230; 416 NW2d 390 (1987); STATE v MAI, supra, 656 P2d at 320.

[58] See IN RE LITTLEFIELD, 5 Cal 4th 122; 19 Cal Rptr 2d 248; 851 P2d 42, 49-50 (1993).

[59] MRE 702, 703, 704.

expert's opinion or conclusions prior to the expert's testimony.[60] The federal rule, FRE 705, is essentially identical to the Michigan rule.[61] Expert witnesses receive special attention under both the criminal and civil rules of procedure, as well as the rules of evidence.[62] Clearly, experts are distinguished so as to provide a fair disclosure of additional information to opposing parties about the nature of an expert witness' expertise and testimony.[63]

Notably, the federal criminal discovery rule, F R Crim P 16, requires reciprocal disclosure of the intent to rely on expert opinion testimony and a summary of the testimony.[64] The Advisory Committee notes to the Rule indicate that purposes for adding provisions requiring disclosure and information about expert testimony included reducing the need for continuances and providing the opponent with a fair opportunity to test the merit

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[60] MRE 705.

[61] See FRE 705; Note to MRE 705.

[62] See MCR 6.201(A)(3); MCR 2.302(B)(4); MRE 702-705.

[63] See MCR 6.201(A)(3); MCR 2.302(B)(4). See also NELSON DRAINAGE DISTRICT v BAY, 188 Mich App 501, 505; 470 NW2d 449 (1991) (a consulting expert who may provide information negative to the defense would not have to be named as a witness or subject to the discovery provisions of the rules).

[64] F R Crim P 16 (a)(1)(E) & (b)(1)(C).

of the expert's testimony through focused cross-examination.[65] Similarly, the federal rules for civil procedure allow for discovery of expert opinions.[66] And under our civil rules of procedure discovery of expert opinions before trial is generally accomplished through procedural rules providing for interrogatories and depositions.[67]

In a decision addressing the use of expert testimony and discovery before trial in a civil case, the United States Court of Appeals for the 10th Circuit discussed at length the "Interface between pretrial discovery and the presentation of expert testimony."[68] The Court observed that the Advisory Committee notes for the civil rules indicated proposals for changes in discovery regarding experts reflected the importance of pretrial discovery on experts:

> [A] prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent. Effective cross-examination of an expert witness requires advance preparation.[69]

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[65] F R Crim P 16 Advisory Committee Notes - 1993 Amendment.

[66] F R Civ P 26

[67] MCR 2.302(B)(4)

[68] SMITH v FORD MOTOR CO, 626 F2d 784, 791-794 (CA10 1980)

[69] Id. at 793.

The Court went on to cite the Advisory Committee Note to FRE 705, indicating:

> [A]dvance knowledge through pretrial discovery of an expert witness's basis for his opinion is essential for cross-examination.[70]

Thus, to make Rule 705 and the provision of the rule allowing the court to require prior disclosure of underlying facts or data effective, the trial judge must be allowed to exercise his discretion to require a timely disclosure of such information.

IV. DISCUSSION

In PEOPLE v LEMCOOL(AFTER REMAND) this court recognized the United States Supreme Court decision in TAYLOR v ILLINOIS that allowed for the enforcement of sanctions imposed for violation of a discovery order. In these and other cases noted above, the courts have found that the evolution of discovery rules promotes a full disclosure of critical facts essential to a fair trial.

The issue of discovery rights and the imposition of sanctions for violation of the discovery rule and a discovery order - in this case relating to the provision of basic reports from Defendant's expert witnesses - led to this appeal and the court's directive to address four specific issues.

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[70] Id.

A. MCR 6.201 and MCL 767.94a allow a trial court to compel creation of a report from a proposed defense expert witness

MCR 6.201

Rule 6.201 specifically allows the trial court to order a modification of the requirements and prohibitions of the rule where good cause is shown. The rule also allows the trial court to exercise discretion in fashioning a remedy where a party fails to comply with the rule. These provisions are consistent with the trial court's authority to control trial proceedings, as well as this Court's recognition that the trial court has broad power to prevent ambush and surprise through the use of discovery, limited only by a defendant's right not to incriminate himself.

The order to provide a basic report is the type of modification or sanction allowed under the rule. It is a less severe sanction than precluding the testimony of the expert witnesses. Moreover, such a basic report does not implicate or offend the defendant's right not to incriminate himself or any other constitutional right. As noted above, courts have generally found no constitutional impediment to requiring discovery from the defense - including disclosure of the nature of his defense and names and addresses of witnesses to be called at trial. To the extent any specific constitutional rights might

be implicated in a request or of concern in a particular case, the rule allows for protection of such information or evidence.

Thus, MCR 6.201 allows a trial court to impose a meaningful sanction including creation of a basic report from a proposed defense expert witness.

MCL 767.94a

In MCL 767.94a, part of the Code of Criminal Procedure, the legislature has provided for disclosure of material or information by the defense to the prosecution. As noted above, the material that must be disclosed by the defense upon request includes:

- the name and last known address of each witness other than the defendant whom the defendant intends to call at trial;

- the nature of any defense the defendant intends to establish at trial by expert testimony;

- any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence, or that was prepared by a person, other than the defendant, whom the defendant intends to call as a witness, if the report or statement relates to the testimony to be offered by the witness.

The stated purpose of the bill was to serve and improve the administration of justice by providing statutory authority for discovery to the prosecutor in the same manner already allowed for the defense. The statute took effect on effective October 1, 1994. However, pursuant to the administrative order of this Court the

statute was superseded by MCR 6.210.

To the extent the statute remains a viable basis for discovery, it supports the disclosure of information regarding a defendant's expert witnesses. The statute neither specifically provides for the creation of reports by experts nor specifically provides for modification or sanctions. However, the statute does not declare that it is the exclusive basis for a trial court's consideration of sanctions or orders in regard to discovery.

The statute clearly provides for discovery by the prosecution form the defense and leaves the trial court free to exercise its inherent authority to control discovery and ensure fairness in pretrial and trial proceedings coming before it. Thus, MCL 767.94a allows a trial court to compel creation of a basic report from a proposed defense expert witness.

B. The court rules authorize a trial court to compel disclosure of a defense

Rule 6.201, in setting forth the purpose and construction of the Court rules, provides that the rules are intended to promote a just determination of very criminal proceeding and are to construed to secure fairness and eliminate unjustifiable expense and delay. As noted above, Rule 6.201 specifically provides for the defense to provide the prosecutor with information about expert witnesses. The rule also allows the

trial court to order a modification of the requirements and prohibitions of the rule where good cause is shown, as well as to fashion a remedy for failing to comply with the rule. The rule prohibits discovery that is protected by the constitution, a statute or privilege. An order that requires the defense to provide a basic report from an expert does not violate any of those prohibitions. Providing information about the nature of a defense or the defense witnesses that the defendant intends to present at trial is not protected by the rule against self-incrimination. The privilege does not extend to statements or testimony by third parties or to physical evidence. Providing information in the form of a basic report does not implicate work-product protection because there is no requirement that such a report be all inclusive or include opinions, theories or conclusions of defense counsel or statements of the defendant. To the extent any such right or privilege is implicated the rules specifically allow the trial court to preclude any such discovery. However, a showing of such right must be made - mere claims of such an invasion or intrusion on protected rights is not sufficient.

Thus, as this Court noted in the VANDERVLIET case the court rules can authorize the trial court to compel disclosure of a defense.

C. The court rule - MCR 6.201 - controls discovery in a criminal case

Discovery is generally recognized as a matter of procedure designed to aid in the judicial search for the truth. Discovery rules provide the procedure to ensure that the ascertainment of the truth - assuring an opportunity for full disclosure of facts in a manner that is orderly and expeditious, as well as fair. As explained above, the Michigan constitution provides the Supreme Court with the exclusive authority to determine rules of practice and procedure. In conjunction with issuing Rule 6.201, this Court issued Administrative Order 1994-10, stating that discovery in criminal cases is governed by the court rule, and not by MCL 767.94a. The Order relied upon MCR 1.104 providing that rules of practice set forth in any statute, if not in conflict with any of these rules, are effective until superseded by rules adopted by the Supreme Court.

The rule reflects an exercise of the constitutional mandate for the Court to establish rules that simplify amplify the procedures for discovery. The rule provides an opportunity for full disclosure of information and facts to both sides so that each party may fully address the facts at trial in an orderly and expeditious manner. The Rule includes specific provisions for excluding information subject to privilege or other

protections, as well as providing the trial court with specific authority to modify the rule and address a failure to comply. Rule 6.201 addresses discovery procedures in a more thorough and comprehensive fashion than the statute. Therefore, MCL 767.94a, has been superseded Rule 6.201 controls discovery in a criminal case.

D. MRE 705 gives the trial court discretion to order disclosure of a defense expert's opinion

Like its federal counterpart, MRE 705 specifically provides that the court may require prior disclosure of facts or data underlying the expert's opinion or conclusions prior to the expert's testimony. The rule is the same for civil and criminal cases. Providing for disclosure and information about expert testimony reduces the need for continuances and provides a fair opportunity to test the merit of an expert's opinion and testimony through focused cross-examination. The United States Court of Appeals for the 10th Circuit in SMITH v FORD MOTOR CO, noted the advisory committee concerns that a prohibition against discovery of information held by expert witnesses produces in acute form the very evils that discovery has been created to prevent and noted that effective cross-examination of an expert witness requires advance preparation.

Thus, the provision of Rule 705 allowing the court to require prior disclosure of underlying facts or data, allows the trial judge to exercise his discretion to require a timely disclosure of such information - including disclosure of a basic report regarding the expert's opinion.

V. CONCLUSION

The discovery requests and orders in the present case specifically dealt with experts named as witnesses for trial by the defense. The prosecutor indicated in his motions that discovery of information related to Defendant experts named as trial witnesses would be in the interest of fairness, prevent trial by ambush and provide less disruption of trial proceedings because it would allow the prosecutor to adequately prepare his case.

In ordering Defendant to provide the People with a basic report on his experts and on the findings of the experts in this case involving an automobile crash, death and alcohol, the trial judge was acting well within his authority to control trial proceedings to ensure fairness and the efficient administration of justice. The court rules, the rules of evidence and the underlying basis for the rules should be considered in conjunction with one another. MCR 6.201 and MRE 705 reflect the special concerns and

considerations that come into play where a trial will involve expert witnesses - persons with some specialized knowledge.

The trial court order in the present case was permissible under the rules of criminal procedure and under the rules of evidence. The record reveals that the order specifically requiring reports from Defendant's named expert witnesses was a proper response to the defense failure to comply with the discovery rules and an earlier order. The order in no way infringes on any rights or privileges of the Defendant. Moreover, pretrial discovery of information on Defendant's experts will prevent delay and confusion during trial - thus allowing for a fair ascertainment of the truth.

The trial court's order for Defendant to provide discovery on his expert witnesses should be upheld and the decision of the Court of Appeals reversed.

SUMMARY AND RELIEF SOUGHT

The trial judge in this case properly interpreted MCR 6.201 and MCL 767.94a as providing the authority for the judge to address the discovery issues and violations involving expert witnesses to be presented at trial by the defense.

The People maintain that MCR 6.201 as a rule of procedure established by this Court is the controlling authority in this matter. The rule clearly allows a trial judge to order a remedy for a violation of the discovery rule and related orders. A proper reading of the rule reveals that upon good cause shown to the trial judge, the judge may order a modification of the requirements and prohibitions of the rule. The rule also provides that if a party fails to comply with the rule the court has discretion to order a remedy.

The trial judge must have the authority to control pretrial and trial proceedings to provide for a fair and orderly identification and presentation of evidence. Without such discretion, the authority of the court and the judicial process is undermined.

As an alternative to MCR 6.201, or the provisions of MCL 767.94a, MRE 705 supports the decision of the trial judge to order disclosure of a basic report from Defendant's expert witnesses. The rule was designed to allow for a full disclosure of facts underlying an expert's opinion through cross-examination. Advance

knowledge through pretrial discovery of the basis for an expert's opinion is essential for effective cross-examination.

The Court of Appeals failed to consider the factors leading to the trial court's order requiring Defendant to produce basic reports from his experts. Moreover, the Court of Appeals decision implies that the only discovery a trial court can require is that allowed under the mandatory provisions of the court rule. Such a limited and restrictive view is not supported by the language of MCR 6.201, MCL 767.94a, or MRE 705 and it is not supported by the underlying policy of all discovery provisions - a complete and fair ascertainment of the truth.

The People respectfully request that this Court reverse the decision of the Court of Appeals and uphold the decision of the trial court to require the defense in this case to provide a basic report and vitae from Defendant's expert witnesses.

Respectfully submitted,

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PROSECUTING ATTORNEY

Dated: September 4, 2002.

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STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Judges: D. Holbrook, H. Hood, R. Griffin

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant	Supreme Court No. 119429
-vs-	Court of Appeals No. 230811
PAUL LEWIS PHILLIPS, JR., Defendant-Appellee	Saginaw Circuit Court No. 00-018277-FC-1

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF SAGINAW)

JANET M. BOES, being sworn, states that on September 4, 2002, she personally delivered, the original plus twenty-four (24) copies of Appellant's Brief on Appeal - Oral Argument Requested and Appendices, together with Proof of Service, to **Clerk, Michigan Supreme Court.**

Dated: September 4, 2002

Janet M. Boes
JANET M. BOES

Subscribed and sworn to before me
On September 4, 2002.

Maria A. Sian
MARIA A. SIAN, Notary Public
Saginaw County, Michigan
My Commission Expires: December 3, 2003